Supreme Court, U.S.
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No. 95-1763

In The

Supreme Court of the United States

October Term, 1995

J.M. MARTINAC & CO. and MARCO SEATTLE INC.,

Petitioners,

vs.

SARATOGA FISHING CO.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

KEITH ZAKARIN
Counsel of Record
RICE FOWLER BOOTH
& BANNING
Attorneys for Respondent
402 West Broadway, Suite 850
San Diego, California 92101
(619) 230-0030

8962
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

LIST OF PARTIES

The parties to this action and their counsel of record are as follows:

For Petitioner Saratoga Fishing:

KEITH ZAKARIN
RICE FOWLER BOOTH & BANNING
402 West Broadway, Suite 850
San Diego, California 92101
(619) 230-0030

For Respondent J.M. Martinac & Co.:

DUNCAN B. KOLER
KOLER, KUMPF & PROWS
3033 Fifth Avenue, Suite 300
San Diego, California 92103
(619) 683-2944

For Respondent Marco Seattle, Inc.:

DANIEL B. MACLEOD
110 West "C" Street, Suite 1600
San Diego, California 92101
(619) 234-7000

CORPORATE DISCLOSURE

Petitioner Saratoga Fishing has no parent company or subsidiaries.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals, filed October 26, 1995, is reported at 69 F.3d 1432 (9th Cir. 1995). Neither the district court's Findings on Liability, nor its Oral Findings on damages are reported. The original opinion of the Ninth Circuit Court of Appeals, filed April 25, 1995, and the first revised opinion of the Ninth Circuit Court of Appeals, filed August 4, 1995 are not published.

STATEMENT OF JURISDICTION

The Ninth Circuit Court of Appeals entered its order denying rehearing of Saratoga's motion for reconsideration on January 30, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Because these claims arose on the high seas, they fall within the admiralty jurisdiction of the federal courts under 28 U.S.C. § 1333.

STATEMENT OF THE CASE

Respondent Saratoga Fishing ("Saratoga") sued Petitioner for damages resulting from a conflagration that occurred on the M/V SARATOGA on or about January 16, 1986, in which M/V SARATOGA burned and sank. M/V SARATOGA was originally purchased on or about 1972 from the manufacturer, J.M. Martinac & Co. ("Martinac"), by Joseph Madruga, a private individual. The hydraulic system on the vessel was designed by Marco Seattle Inc. ("Marco"). The vessel was completed in 1972, taken to Panama and outfitted with a seine and other fishing equipment, and Madruga began fishing operations with the vessel, with Manual Vargas as its captain.

In 1974, Joseph Madruga sold M/V SARATOGA to the Manual S. Vargus, Jr. Corporation, which later changed its name

to Saratoga. At the time of that sale, M/V SARATOGA was equipped with five speedboats, a purse skiff, a seine, and various electronic equipment. On or about January 16, 1986, a hydraulic hose detached from its coupling, spraying hydraulic fluid in the engine compartment. Because Martinac and Marco had failed to provide any effective shielding, the hydraulic fluid sprayed onto the nearby extremely hot turbocharger and ignited. The resulting conflagration burned and sank M/V SARATOGA. The crew just managed to get off the ship into a skiff before the vessel sank.

The district court concluded that Marco and Martinac were strictly liable for the loss of M/V SARATOGA in that the hydraulic system was defectively designed. The court awarded damages of $1,264,546. The award included the loss of "other property" on board M/V SARATOGA, including the tuna catch, seine, skiff, fuel, equipment, payments by Saratoga to the crew for their personal property losses, the cost of rescue and certain cash. With pre-judgment interest, the total award to Saratoga, after reduction by two-thirds for Saratoga's comparative negligence, came to $734,940.38.

All parties appealed the district court's decision. In its original opinion, issued April 25, 1995 (the "Original Opinion"), the panel correctly recognized that the "product" in products liability cases, including maritime products liability cases, is determined by what the *manufacturer* places in the stream of commerce. The court therefore agreed with the Fifth Circuit that,

> additions to a vessel should be considered other property "separate from the product that the *manufacturer originally* sold, if the distinction enunciated in *East River* between a 'product' and 'other property' is to have any meaning."

Quoting Nicor Supply Ships Associates v. General Motors, 876 F.2d 501, 505 (5th Cir. 1989) (emphasis added, italics in the original). To distinguish the "product" from "other property" on M/V SARATOGA, the court looked to "the vessel that Martinac sold to Madruga in 1972." Including in the "product" items not part of the vessel originally sold by Martinac to Madruga,

> would undermine the "other property" exception contained in *East River*. Under that rationale, the product would envelop everything else useful in the operation of the vessel, which is not consistent with the balance struck by the Supreme Court.

On August 4, 1995 (the "First Revised Opinion"), the same panel scuttled its well-reasoned original opinion and changed course 180 degrees. Misreading *East River*, the panel unanimously held that the manufacturer's "product" is defined for strict products liability as the object that was last transferred from *any* seller to a buyer, even if the seller, as in this case, is a private person and *not* a "seller . . . who is engaged in the business of selling such a product" as defined by the Restatement (Second) of Torts, § 402(1)(a). Saratoga then moved for reconsideration, noting that the court's ruling abandoned Section 402A of the Restatement (Second) of Torts, ignored the Ninth Circuit's earliest decision in *Pan-Alaska Fisheries, Inc.*, 565 F.2d 1129 (9th Cir. 1977) (adopting § 402A as the law of the Ninth Circuit), placed the Ninth Circuit in direct conflict with the Fifth Circuit by disregarding the well established maritime rule set in *Nicor*, 876 F.2d 501, and placed the Ninth Circuit in conflict with this Court's seminal decision in *East River v. Transamerica Delaval*, 476 U.S. 858 (1986). Saratoga again sought rehearing.

On October 26, 1995, a third superseding opinion was issued (the "Second Revised Opinion"). (App. 4a). It is this

opinion that is at issue in this petition. In the second revised opinion, only two members of the panel, Beezer, J. and Ezra, J. (the "majority"), voted to stand by their first revised opinion of August 4, 1995. The third member, Noonan, J., parted company with the majority on its determination of "other property," recognizing that its decision placed this Circuit in conflict not only with the Fifth Circuit's decision in *Nicor,* but with the Ninth Circuit's previous decision in *Pan-Alaska* and with this Court's decision in *East River* as well. (App. 40a-41a). That dissent, set forth in full, encapsulates perfectly the Ninth Circuit's error:

> I concur in the opinion of the court, except as to its exclusion of damages for the skiff, seine net, fuel, spare parts and other miscellaneous equipment sold by Madruga to Saratoga Fishing as part of the sale of the M/V SARATOGA. None of this property was manufactured or sold by Martinac. Under *East River,* 476 U.S. 858, 867 all of it was "other property," damages for which are recoverable in tort. The court abandons *East River* and puts this circuit in conflict with another major maritime circuit, *Nicor Supply Ships Associates v. General Motors,* 876 F.2d 501, 505-06 (5th Cir. 1989). The opinion also repudiates controlling authority in this circuit, *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.,* 565 F.2d 1129 (9th Cir 1977). That case accepted "as the law of products liability in this circuit, at least for this case arising in admiralty," the Restatement (Second) of Torts, § 402A *Id.* at 1135. Under the Restatement, the original seller of the product in a defective condition that is unreasonably dangerous that has

> entered the stream of commerce is strictly liable to the ultimate consumer for physical harm caused to that consumer's property. Saratoga Fishing is here the ultimate consumer; Martinac is the original seller, the property damaged was Saratoga Fishing's and no more part of the product sold by Martinac than was the tuna catch for which damages are granted.
>
> The court appears to have been swayed by the consideration that additions made by a middleman could increase the original seller's liability. That of course is a risk the seller of an unreasonably dangerous, defective product takes. If the explosion had occurred while Madruga still owned the boat after adding the skiff and net, there is no doubt that Martinac would have been liable for those additional items. Martinac's exposure should not decrease because Madruga sold the ship to Saratoga Fishing. Whatever theory one adopts, the liability of the original seller may change as the ultimate consumer adds or subtracts property which can be affected by the defective product. The theory of strict liability holds that the seller is stuck with whatever foreseeable damage to the consumer's other property his product causes.

(App. 40a-41a, Noonan, J., concurring and dissenting). Saratoga has filed a petition for certiorari of its own specifically addressed to this error.

In all three of its written opinions, however, the Ninth Circuit agreed with the district court's position that the tuna catch was "other property" and fully recoverable under *East River.* Petitioners have nevertheless filed this certiorari petition on whether or not the Saratoga's valuable tuna catch was properly considered "other property" by both the District Court and the Ninth Circuit's three opinions. Saratoga believes certiorari should be granted on the Ninth Circuit's error in excluding the skiff, seine net, fuel, spare parts and other equipment from the definition of "other property," but certiorari should be denied on Petitioners' attempt to obviate product liability law in maritime law.

SUMMARY OF ARGUMENT

Petitioners' certiorari petition seeks to overturn the Ninth Circuit decision in two ways. It first asks that the Ninth Circuit be reversed for applying maritime product liability law to a commercial maritime case. It also asks this Court to order the Ninth Circuit to revisit the district court's factual determinations under the Restatement of Torts (Second) Section 402A.

Petitioners' petition suffers two fatal flaws. Fist, because it asks that commercial maritime cases be excluded from maritime products liability law, it necessarily asks the Court to overrule *East River* without attempting to carry the heavy burden of explaining why this matter should not be controlled by the principles of *stare decisis*. Second, petitioners' section 402A arguments are a transparent attempt to have this Court revisit the factual determinations of the district court which the Ninth Circuit, in three separate decisions, properly refused to disturb.

REASONS FOR DENYING THE WRIT

I.

PETITIONERS ASK THIS COURT TO OVERRULE *EAST RIVER.*

Petitioners ask this Court to overrule its seminal decision in *East River S.S. Corp. v. Transamerica Delaval*, 476 U.S. 858 (1986). Petitioners claim the Ninth Circuit's application of maritime product liability law to commercial transactions is unprecedented and invite the Court to adopt a rule exempting commercial ship manufacturers from product liability law when the buyer is a commercial user:

> The Ninth Circuit's opinion represents an unprecedented extension of strict products liability principles to commercial activity . . . This case brings into sharp focus the public policy question as to whether the concept of strict product liability should apply at all when the dispute is between commercial entities . . .

Petition 7-28. Petitioners make numerous citations to *East River* in support of their proposal yet avoid discussing *East River*'s facts and holding. Indeed the opening line of *East River* reveals that the commercial application of maritime products liability law has been expressly considered and decided:

> In this admiralty case, *we must decide whether a cause of action in tort is stated when a defective product purchased in a commercial transaction malfunctions* . . . We join the Courts of Appeals in recognizing

> product liability, including strict liability, as part of the general maritime law.

East River, 476 U.S. 858, 859 (Emphasis added). Because this Court has already expressly considered and decided that product liability will be applied to "commercial" maritime transactions, petitioners' invitation should be declined.

II.

PETITIONERS MAKE NO ATTEMPT TO CARRY THE HEAVY BURDEN NECESSARY TO OVERTURN *EAST RIVER*.

Petitioners completely ignore the heavy burden they must carry in attempting to have this Court overturn *East River*:

> We note at the outset that the doctrine of *stare decisis* weighs heavily against petitioner in this case. Petitioner seeks to have us overrule our decision in Ragan. *Stare decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law.

Walker v. Armco Steel Corp., 446 U.S. 740, 749 (1980). Because petitioners have made no attempt to explain why this Court should overturn its *East River* decision, this petition should be disregarded.

III.

PETITIONERS' PROPOSAL TO EXCLUDE COMMERCIAL MARITIME TRANSACTIONS FROM THE MARITIME PRODUCTS LIABILITY SPHERE WOULD EFFECTIVELY ELIMINATE THE EXISTING BODY OF MARITIME PRODUCTS LIABILITY LAW.

Petitioners' proposal to exclude commercial transactions from the maritime product liability sphere would effectively end maritime product liability law. Because most maritime product sales involve commercial transactions, all of the important published cases on maritime product liability, including *East River*, involve commercial transactions. *See Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977), *Nicor Supply Ships Associates v. General Motors*, 876 F.2d 501 (5th Cir. 1989) and *Shipco 2295, Inc. v. Avondale Shipyards, Inc.*, 825 F.2d 925 (5th Cir. 1987). In fact, nearly all of Petitioners' maritime product liability citations are "commercial" cases. *See Delancy v. Merchants River Transp.*, 829 F. Supp. 186 (W.D. La. 1993) (suit against barge manufacturer by injured operator.); *Complaint of American Export Lines, Inc.*, 620 F. Supp. 490 (S.D.N.Y. 1985) (suit against container ship manufacturer regarding defective steering which caused multiple death collision with tanker); *Williams v. Brasea, Inc.*, 497 F.2d 67 (5th Cir. 1974) (suit by shrimp boat master for injuries against designer/builder of commercial fishing winch assembly.); *McCune v. F. Alioto Fish Co.*, 597 F.2d 1244 (9th Cir. 1979) (fishing vessel deckhand injury suit against vessel owner with indemnity action by vessel owner against commercial fishing winch manufacturer). Because the *East River* decision, all the major decisions relied upon by the *East River* Court, and almost all the cases interpreting the *East River* decision, including *Nicor*, and *Shipco*, are commercial maritime transaction cases, petitioners

propose, in effect, to overturn most existing maritime products liability law.

IV.

PETITIONERS' "PUBLIC POLICY" ARGUMENTS IN FAVOR OF REMOVING COMMERCIAL MARITIME CASES FROM THE SCOPE OF MARITIME PRODUCTS LIABILITY LAW ARE CONTRARY TO PUBLIC POLICY.

Petitioners argue over and over that the Ninth Circuit erred in allowing commercial maritime cases to proceed under maritime product liability law and that such error is contrary to public policy. Putting aside for a moment the falsity of the argument that the Ninth Circuit did something new in applying maritime products liability to a commercial maritime case, the petitioners' public policy arguments are still wrong. Petitioners argue that "industrial reality" demands a purely contractual approach be taken in commercial maritime product cases or public policy will be thwarted. The "industrial reality" defendants apparently wish to resurrect is one in which no liability would be imposed for injuries caused by products with dangerous and easily remedied defects unrelated to product utility. It was exactly that cruel "industrial reality" which led to the imposition of strict products liability upon manufacturers.

Moreover, this Court expressly considered these public policy issues in *East River*. *East River* dealt with a situation in which multi-million dollar "commercial" ships were sold by a sophisticated "commercial" manufacturer to a sophisticated "commercial" buyer. Nothing in that case even hinted at a desire by this Court to eliminate commercial strict products liability claims under maritime law. In fact, the opposite is true, and for good reason: Virtually *all* ship purchases are "commercial" purchases. Manufacturers of defective products cannot escape

liability for their defective product simply because they sold that defective product to a "commercial" buyer. Were this the rule, where would the dividing line be? Would the law carry over such that "commercial" airline builders would not be liable for defects in their airplanes because the buyers are always "commercial?" The rule petitioners seek is impractical, unworkable and inconsistent with years of product liability law and this Court's ruling in *East River*. Public policy therefore supports maintaining protection against petitioners' "industrial reality."

V.

PETITIONERS' ALLEGATION THAT THE NINTH CIRCUIT ABANDONED RESTATEMENT § 402A IS A FALSELY PREMISED ATTEMPT TO HAVE THE SUPREME COURT OVERTURN THE FACTUAL DETERMINATIONS OF THE DISTRICT COURT.

Petitioners attempt to have this Court revisit the district court's factual determinations with their § 402A arguments. The district court made a finding pursuant to § 402A that the product was defective. It made this finding after applying what petitioners call the "limiting" factors of Restatement (Second) of Torts § 402A. These factors, including the risk/utility test, the open and obvious doctrine, etc., are suggested by § 402A as factors to guide the trial court's *factual* analysis. Petitioners charge the Ninth Circuit erred and "abandoned" the § 402A factors when it refused to overturn the trial court's factual conclusion that, based on the application of all the factors, the product was defective (*i.e.* the utility of the design was outweighed by the magnitude of the danger, etc.). The Ninth Circuit correctly recognized that the district court applied the right analysis and that the factual conclusions were undoubtedly within the district court's discretion. Petitioners conclude that,

> The Ninth Circuit's abandonment of § 402A's liability limitations means strict product liability recovery will now be applied to commercial cases for which strict product liability was never designed.

Petition at 11. Because *East River* specifically held that product liability law *does* apply to the commercial maritime context, *Id.*, 476 U.S. at 859, the "great harm" allegedly caused by the Ninth Circuit's correct affirmation of the factual determinations of the district court is a non-event.

VI.

PETITIONERS' INVITATION TO ADOPT THE PRODUCT LIABILITY LAW OF CERTAIN STATES SHOULD BE DECLINED AS YET ANOTHER ATTEMPT TO OVERTURN THIS COURT'S DETERMINATION IN *EAST RIVER*.

In the state law section of their brief petitioners once again ignore the determination of this Court in *East River* that commercial cases are within the realm of maritime products liability law and ask the Court to adopt the contrary authority of several states. *Id.*, 476 U.S. at 859. Uniformity of maritime law will certainly not be served by entering the maze of state law product liability decisions. Moreover, because *East River*, and *all* its progeny, stand for the contrary conclusion, petitioners' state law arguments are moot.

VII.

PETITIONERS' "OTHER PROPERTY" INTERPRETATION IS WRONG.

Petitioners mis-quote and misapply *East River* in their analysis of what "other property" is (or should be in their view) under *East River*. Petitioners argue that,

> The lesson of East River is that there is no tort recovery for consequential commercial damages representing failed contractual expectations in a commercial context. . . . Saratoga's loss of fish catch is just such a consequential commercial loss, because the failure of the vessel to carry its frozen catch to market represents a failure of the plaintiff's commercial expectations.

Petition at 23. The *East River* decision, however, defined "other property" in relation to the "product" which was defined as that which the *manufacturer* sold:

> In this case, there was no damage to "other" property. Rather, the first second and third counts allege that each supertanker's defectively designed turbine components damaged only the turbine itself. Since each turbine was supplied by Delaval as an integrated package, each is properly regarded as a single unit.

East River at 867. Therefore, the fish catch, being other property upon the boat separate from the product which Martinac sold to Joseph Madruga, is compensable under the *East River* decision.

Petitioners' alleged contrary authority and "commercial expectation argument" are neither on point or persuasive. Petitioners place primary reliance on *Louis Dreyfus Corp. v. 27,946 Long Tons of Corn*, 830 F.2d 1321, 1328 n.5 (5th Cir. 1987) for their argument that the tuna catch was merely a "commercial expectation." Their reliance is misplaced. *Louis Dreyfus* involved a loss of cargo, which by definition is not the shipowner's property, but the property of another carried for a fee. The fee the shipowner hoped to get was indeed merely an expectation which had no value until the service he was providing was completed. In contrast, the tuna catch was respondent's valuable property. The *Dreyfus* court concluded that the *East River* decision had no application to the facts under its consideration. *Dreyfus*, 830 F.2d at 1318 n.5. *Employers Ins. of Wausau* is inapplicable for the same reason. 866 F.2d 752, 763 (5th Cir. 1989).

Petitioners next attempt to support their argument against the "other property" nature of the tuna catch by reference to a handful of state law based agricultural product liability cases. All those cases are distinguishable as non-maritime, and have been culled from the myriad of conflicting and fact-driven state products liability decisions. The agricultural cases are also distinguishable because of the manner in which the damage occurred in those cases. As *Agristor Leasing v. Guggisberg*, 617 F. Supp. 902, 908 (D. Minn. 1985), applying Minnesota law, explains:

> Where damage results from deterioration, internal breakage, or failure to live up to expectation, recovery is allowed only on a contract or warranty theory. On the other hand, where the damage is sustained from hazardous conditions or a sudden, calamitous occurrence, courts would allow recovery under a tort theory.

The *Agristor* court concluded that because the grain storage unit merely failed to perform as expected, no tort based claim was possible. In stark contrast, the explosion, fire and sinking of the Saratoga could hardly be termed anything less than a calamitous event. The other agricultural decisions cited by petitioners are inapplicable for the same reasons. *Thofson v. Redex Industries Inc.*, 433 N.W. 2d 901, 904 (Minn. App. 1988) (also applying Minnesota law, tort damages allowed only when damage is other than that which could ordinarily be contemplated by the parties); *Purvis v. Consolidated Energy Products Co.*, 674 F.2d 216, 223 (4th Cir. 1982) (plaintiff's evidence may have demonstrated, under South Carolina law, that the barns performed their intended task poorly, but it did not establish that they posed a safety hazard). These irrelevant state law cases should properly be disregarded.

CONCLUSION

The petition fails for two primary reasons. Petitioners' request to make commercial cases exempt from maritime products liability law is contrary to this Court's *East River* decision. Petitioners' other arguments are all attempts to re-litigate the *facts* of this case. Throughout the analysis petitioners charge that, in finding the tuna catch to be "other property," the Ninth Circuit abandoned the law on product liability. The truth is that the Ninth Circuit and the District Court decided the status of the tuna catch correctly and petitioners would prefer a different result. No proper basis for certiorari has been asserted by petitioners. *East River* is and should remain good law.

Respectfully Submitted,

KEITH ZAKARIN
Counsel of Record
RICE FOWLER BOOTH
& BANNING
Attorneys for Respondent
402 West Broadway, Suite 850
San Diego, California 92101
(619) 230-0030